No. 90-659

In the Supreme Court of the United States

OCTOBER TERM, 1990

KEITH R. GOLLUST, ET AL., PETITIONERS

v.

IRA L. MENDELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b), a shareholder's properly instituted suit to recover short-swing profits from an issuer's statutory insiders may be maintained after a merger involving the issuer results in an exchange of the plaintiff's stock for cash and stock in the issuer's new corporate parent.

TABLE OF CONTENTS

	Page
Interest of the Securities and Exchange Commission	1
Statement	2
Summary of argument	5
Argument:	
Respondent's properly instituted Section 16(b) action was not subject to dismissal because of the issuer's post-suit merger	7
A. The plain language of Section 16(b) does not support the dismissal of a pending action because of a post-suit merger	7
B. The purposes and background of Section 16(b) indicate that respondent's action survives the issuer's merger	12
C. Neither precedents nor the existence of other remedies requires the dismissal of respondent's action	22
Conclusion	28
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Alford v. *Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990)	20
American Standard, Inc. v. *Crane Co.*, 510 F.2d 1043 (2d Cir. 1974), cert. denied, 421 U.S. 1000 (1975)	26
Bangor Punta Operations, Inc. v. *Bangor & A. R.R.*, 417 U.S. 703 (1974)	19
Benisch v. *Cameron*, 81 F. Supp. 882 (S.D.N.Y. 1948)	19
Blau v. *Lamb*, 363 F.2d 507 (2d Cir. 1966), cert. denied, 385 U.S. 1002 (1967)	23-24
Blau v. *Lehman*, 368 U.S. 403 (1962)	22
Blau v. *Mission Corp.*, 212 F.2d 77 (2d Cir.), cert. denied, 347 U.S. 1016 (1954)	19

Cases—Continued: Page

Blau v. *Oppenheim*, 250 F. Supp. 881 (S.D.N.Y. 1966) 12, 25
Burks v. *Lasker*, 441 U.S. 471 (1979) 19
Clarke v. *Mathewson*, 37 U.S. (12 Pet.) 164 (1838) 10
Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) 18
Consumer Product Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 8
Cramer v. *General Tel. & Elec. Corp.*, 582 F.2d 259 (3d Cir. 1978), cert. denied, 439 U.S. 1129 (1979) 14
Crandon v. *United States*, 110 S. Ct. 997 (1990) 12
Dottenheim v. *Murchison*, 227 F.2d 737 (5th Cir. 1955), cert. denied, 351 U.S. 919 (1956) 18, 19
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 23
Foremost-McKesson, Inc. v. *Provident Securities Co.*, 423 U.S. 232 (1976) 22, 23
Freeport-McMoRan, Inc. v. *K N Energy, Inc.*, No. 90-655 (Feb. 19, 1991) 10
Gaillard v. *Natomas Co.*, 173 Cal. App. 3d 410, 219 Cal. Rptr. 74 (1985) 20, 21
General Motors Corp. v. *United States*, 110 S. Ct. 2528 (1990) 10
Grogan v. *Garner*, 111 S. Ct. 654 (1991) 12
Gwaltney of Smithfield, Ltd. v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) 21
Hawes v. *Oakland*, 104 U.S. 450 (1882) 19
Herman & MacLean v. *Huddleston*, 459 U.S. 375 (1983) 20
International Org. for Masters v. *Brown*, No. 89-1330 (Feb. 20, 1991) 10
Kauffman v. *Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970), cert. denied, 401 U.S. 974 (1971) 18
Kern County Land Co. v. *Occidental Petroleum Corp.*, 411 U.S. 582 (1973) 8, 22
Landreth Timber Co. v. *Landreth*, 471 U.S. 681 (1985) 8

Cases—Continued: Page

Lewis v. *Anderson*, 477 A.2d 1040 (Del. 1984) 20
Lewis v. *Chiles*, 719 F.2d 1044 (9th Cir. 1983) 18
Lewis v. *Knutson*, 699 F.2d 230 (5th Cir. 1983) 18
Lewis v. *McAdam*, 762 F.2d 800 (9th Cir. 1985) 16, 24
Magida v. *Continental Can Co.*, 231 F.2d 843 (2d Cir.), cert. denied, 351 U.S. 972 (1956) 15
Mollan v. *Torrance*, 22 U.S. (9 Wheat.) 537 (1824) 10
Morales v. *Lukens, Inc.*, 593 F. Supp. 1209 (S.D. N.Y. 1984) 26
Newmark v. *RKO Gen., Inc.*, 425 F.2d 348 (2d Cir.), cert. denied, 400 U.S. 854 (1970) 26
Papilsky v. *Berndt*, 466 F.2d 251 (2d Cir.), cert. denied, 409 U.S. 1077 (1972) 18
Pellegrino v. *Nesbit*, 203 F.2d 463 (9th Cir. 1953) 14, 15
Pennsylvania Dep't of Public Welfare v. *Davenport*, 110 S. Ct. 2126 (1990) 8
Portnoy v. *Kawecki Berylco Indus., Inc.*, 607 F.2d 765 (7th Cir. 1979) 25
Portnoy v. *Revlon, Inc.*, 650 F.2d 895 (7th Cir. 1981) 15
Reliance Elec. Co. v. *Emerson Elec. Co.*, 404 U.S. 418 (1972) 8, 15, 22
Reves v. *Ernst & Young*, 110 S. Ct. 945 (1990) 14
Rothenberg v. *United Brands Co.*, [1977-78] Fed. Sec. L. Rep. (CCH) ¶ 96,045 (S.D.N.Y.), aff'd mem., 573 F.2d 1295 (2d Cir. 1977) 25
Russello v. *United States*, 464 U.S. 16 (1983) 10
St. Paul Mercury Indemnity Co. v. *Red Cab Co.*, 303 U.S. 283 (1938) 11
Staffin v. *Greenberg*, 509 F. Supp. 825 (E.D. Pa. 1981), aff'd, 672 F.2d 1196 (3d Cir. 1982) 25-26
United States Parole Comm'n v. *Geraghty*, 445 U.S. 388 (1980) 21
Untermeyer v. *Valhi, Inc.*, 665 F. Supp. 297 (S.D.N.Y. 1987), aff'd mem., 841 F.2d 1117, aff'd on reh'g, 841 F.2d 25 (2d Cir.), cert. denied, 488 U.S. 868 (1988) 16, 24

Cases—Continued: Page

Western Auto Supply Co. v. *Gamble-Skogmo, Inc.*, 348 F.2d 736 (8th Cir. 1965), cert. denied, 382 U.S. 987 (1966) ... 26

Wichita R.R. v. *Public Util. Comm'n*, 260 U.S. 48 (1922) ... 10

Constitution, statutes, regulations and rules:

U.S. Const. Art. III ... 6, 13, 20, 21

Securities Exchange Act of 1934, 15 U.S.C. 78(a) *et seq.* ... 1

§ 3(a)(10), 15 U.S.C. 78c(a)(10) ... 14

§ 3(c), 15 U.S.C. 78c(b) ... 2

§ 10(b), 15 U.S.C. 78j(b) ... 23

§ 12, 15 U.S.C. 78*l* ... 14

§ 16(a), 15 U.S.C. 78p(a) ... 2

§ 16(b), 15 U.S.C. 78p(b) ... *passim*, 1a

§ 20a(a), 15 U.S.C. 78t-1(a) ... 23

§ 21(u), 15 U.S.C. 78u ... 2

§ 23(a)(1), 15 U.S.C. 78w(a)(1) ... 2

2 U.S.C. 288k(a) ... 11

8 U.S.C. 1503(a) ... 11

42 U.S.C. 405(g) ... 11

17 C.F.R.:

Section 240.10b-5 ... 23

Section 240.14e-3 ... 23

56 Fed. Reg. 7242 (Feb. 21, 1991) (17 C.F.R.) ... 2

Fed. R. Civ. P.:

Rule 23.1 ... 18, 19, 24

Rule 60(b) ... 4

Miscellaneous:

ABA Committee on Federal Regulation of Securities, *Report of the Task on Regulation of Insider Trading, Part II: Reform of Section 16*, 42 Bus. Law. 1087 (1987) ... 16

Black's Law Dictionary:

(3d ed. 1933) ... 11

(6th ed. 1990) ... 11

Cook & Feldman, *Insider Trading Under the Securities Exchange Act*, 66 Harv. L. Rev. 385 (1953) ... 14

Miscellaneous—Continued: Page

D. DeMott, *Shareholder Derivative Actions: Law and Practice* (1987 & Supp. 1990) ... 20

13 W. Fletcher, *Cyclopedia of the Law of Private Corporations* (rev. perm. ed. 1984) ... 19

H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934) ... 13

2 L. Loss, *Securities Regulation* (2d ed. 1961) ... 24

National Securities Exchanges—H.R. 7852: Hearings Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934) ... 17

Note, *Survival of Rights of Action After Corporate Merger*, 78 Mich. L. Rev. 250 (1979) ... 20

Ownership Reports and Trading by Officers, Directors and Principal Stockholders, Exchange Act Release No. 26333 (Dec. 2, 1988), [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,343 ... 27

Ownership Reports and Trading by Officers, Directors and Principal Stockholders, Exchange Act Release No. 27148 (Aug. 18, 1989), [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,439 ... 27

Ownership Reports and Trading by Officers, Directors and Principal Stockholders, Exchange Act Release No. 28869 (Feb. 8, 1991) ... 27

Random House Unabridged Dictionary of the English Language (2d ed. 1987) ... 11

P. Romeo, *Comprehensive Section 16 Outline* (E.P. Executive Press, Inc. June 1989) ... 16

S. Rep. No. 792, 73d Cong., 2d Sess. (1934) ... 8

S. Rep. No. 1455, 73d Cong., 2d Sess. (1934) ... 8, 13

7C C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* (2d ed. 1986) ... 19

Yourd, *Trading In Securities By Directors, Officers and Stockholders: Section 16 Of The Securities Exchange Act*, 38 Mich. L. Rev. 133 (1939) ... 11

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INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission administers and enforces the federal securities laws, including the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* Section 16(b) of that Act, 15 U.S.C. 78p(b), provides that officers, directors, and beneficial owners of more than 10% of an issuer's registered stock shall be liable to the company for profits realized from "short-swing" trading in the issuer's stock—a purchase and sale, or sale and purchase, within less than six months. Section 16(b) further provides that if the issuer refuses a demand for suit to recover such profits, "[s]uit * * * may be instituted * * * by the owner of any security of the issuer in the name and in behalf of the issuer." The issue in this case is whether a shareholder's properly instituted suit under

Section 16(b) must be dismissed when, as a result of the issuer's subsequent merger, the plaintiff is divested of his stock and receives, in exchange, cash and stock in the issuer's new corporate parent.

Section 16(b) plays a significant role in protecting against the misuse of inside information in the securities markets. Because of the ease with which corporate insiders and major shareholders can exploit informational advantages, Section 16(b) erects a strict, prophylactic rule that captures short-swing profits for the benefit of the issuer. Because only the issuer and its security holders—not the SEC—may institute actions under Section 16(b), it is particularly important that the deterrent force of that provision not be diluted.[1] Accordingly, the Commission has a strong interest in ensuring that the effectiveness of Section 16(b) is not jeopardized by unduly restrictive standing requirements imposed on security-owner suits.

STATEMENT

1. In January 1987, respondent Ira L. Mendell filed a complaint in the United States District Court for the Southern District of New York alleging that he was an owner of common stock of Viacom International Inc. (International), and that petitioners were liable to International for profits realized from certain transactions in International stock under Section 16(b) of the Securities Exchange Act, 15 U.S.C. 78p(b).[2] Pet. App. 4a. Respondent's complaint alleged that during 1986, petitioners collectively owned more than 10% of International's common stock and had realized approximately $11,000,000 in profits from short-swing trading. Respondent further alleged that in October 1986 he had made demand on International and its directors to institute an action under Section 16(b) to recover those profits, but suit had not been brought although more than 60 days had passed. Pet. App. 4a-5a.

2. In June 1987, approximately six months after the complaint was filed, International was acquired through a merger transaction by Arsenal Acquiring Corporation (Arsenal), a wholly owned subsidiary of a company then called Arsenal Holdings, Inc., and now known as Viacom, Inc. (Viacom). Arsenal was merged into International, and International thereby became a subsidiary of Viacom. As part of this transaction, the shares owned by public shareholders of International were exchanged for a combination of cash and stock in Viacom. Accordingly, respondent, who was a shareholder of International when this action was instituted, became a shareholder of Viacom, International's new parent and sole shareholder. Respondent amended his complaint in response to the restructuring to allege a Section 16(b) action in behalf of Viacom as well as International. Pet. App. 5a, 31a-32a, 39a-45a; J.A. 27-28, 30-31.

Following the merger, petitioners moved for summary judgment, arguing that respondent lacked standing under Section 16(b) because he no longer owned International securities. The district court granted the motion, stating that "[s]uits to disgorge ill-gotten gains under § 16(b) may be prosecuted only by the issuer itself or the holders of its securities"; because respondent "no longer owns any International securities, he may not sue under § 16(b)." Pet. App. 32a.[3]

[1] The SEC does enforce the reporting requirements of Section 16(a) (see 15 U.S.C. 78p(a), 78u), under which statutory insiders must report to the Commission their transactions in the issuer's stock, and, pursuant to its rulemaking powers, *e.g.*, 15 U.S.C. 78c(b) (authority to define "technical, trade, accounting and other terms"); 15 U.S.C. 78p(b) (power to exempt certain transactions from Section 16(b)); 15 U.S.C. 78w(a)(1) (general rulemaking authority), has promulgated rules to implement Section 16(a) and (b). See 56 Fed. Reg. 7242 (Feb. 21, 1991) (to be codified in scattered sections of 17 C.F.R.).

[2] The text of Section 16(b) is set forth in the appendix to this brief.

[3] The court also rejected respondent's argument that he had standing as a Viacom shareholder to assert a "double derivative"

3. The court of appeals reversed, concluding that respondent did not lose his standing under Section 16(b) by virtue of the merger in this case. The court began by noting that Section 16(b) is a remedial law that should be construed to fulfill Congress's purpose to prevent the exploitation of inside information by certain corporate insiders. Pet. App. 7a-10a. In light of the provision's background, the court stated that "[w]here differing constructions of § 16(b)'s terms are possible," the issue "whether a plaintiff has standing to bring suit is, in part, determined by whether the policy behind the statute is best served by allowing the claim." *Id.* at 9a, 12a.

Here, the court found, the policy expressed in Section 16(b) favors respondent's standing. Because of the merger transaction, there were no public shareholders of International; only its parent corporation held International stock. Observing that it is "unrealistic" to rely on an issuing corporation to sue its insiders, the court found that to "leav[e] insiders to police themselves" is contrary to Section 16(b)'s objectives because it would thwart the "private shareholder enforcement purpose" underlying the provision. Pet. App. 13a-14a.

The court rejected petitioners' contention that the statutory language requires that a security holder lose standing if he ceases to hold his securities during the pendency of the action. In the court's view, the language of the statute requires no such result; it "speaks of the 'owner' of securities[,] but such language is not modified by the word 'current' or any like limiting expression." Pet. App.

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action under Section 16(b). Pet. App. 33a. That issue was not reached by the court of appeals. *Id.* at 18a.

After the district court granted summary judgment, but before it entered a judgment of dismissal, respondent purchased a subordinated note issued by International, and moved, pursuant to Fed. R. Civ. P. 60(b), to vacate the judgment on the basis that he had standing under Section 16(b) as a noteholder. J.A. 35-36. The district court denied the motion, finding that the applicable standards under Rule 60(b) were not satisfied. Pet. App. 36a-38a. The court of appeals affirmed that ruling. *Id.* at 18a-19a.

15a. If Congress had intended to bar the maintenance of suits following the issuer's merger, the court noted, it could easily have done so. *Ibid.* The court also distinguished precedents holding that particular plaintiffs lacked standing when they were not current shareholders; in none of those cases had the plaintiff filed suit while holding the issuer's shares and later exchanged them for stock in the issuer's new parent. *Id.* at 15a-17a. Finally, the court noted that if petitioners' construction were accepted, it would open the door to "intentional restructuring" of a corporation in order to defeat a pending Section 16(b) claim instituted by a security holder. That result, the court stated, "would undercut the function Congress planned to have shareholders play in policing such actions." *Id.* at 17a.[4]

SUMMARY OF ARGUMENT

The court of appeals correctly held that respondent did not lose standing to maintain this action under Section 16(b) because of the post-suit merger in this case. The proposed standing restriction advocated by petitioners—that a security owner must continuously hold his shares throughout the suit—finds no support in the statutory language, would thwart the enforcement mechanism underpinning Section 16(b), and would introduce unwarranted anomalies into the application of the statute.

A. Section 16(b) creates a strict-liability rule that profits realized by statutory insiders from short-swing trading in the issuer's stock shall be disgorged to the issuer; it further provides that "[s]uit to recover such profit may be instituted * * * by the owner of any security of the issuer." 15 U.S.C. 78p(b). Respondent satisfied the requirements of the statute by "institut[ing]" this action as an owner of the issuer's common stock;

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[4] Judge Milton Pollack, sitting by designation, dissented, arguing that the majority's ruling conflicted with the terms of the statute, Second Circuit precedent, and decisions of other courts of appeals. Pet. App. 20a-29a.

nothing in the text of the statute suggests that respondent was later divested of standing because of the issuer's post-suit merger. Indeed, the principle that statutory standing relates to the moment that the plaintiff files suit is quite familiar to the law.

B. The purposes and background of Section 16(b) confirm that there is no unstated "continuous ownership" requirement implicit in the statute. The paramount purpose served by Section 16(b) is to prevent statutory insiders from reaping short-swing profits in situations posing a risk of abuse, and to ensure that a wide pool of public security holders is available to perform a policing function. It would frustrate that purpose to allow insiders to evade their Section 16(b) liability because of the fortuity of a post-suit merger, in which the plaintiff's securities are exchanged for stock in the issuer's new corporate parent.

It would be particularly inappropriate to borrow a continuous-ownership requirement from the law of shareholder derivative actions; Section 16(b) consistently departs from that model in the direction of easing restrictions on security-holder suits. Any concerns about the adequacy of a post-merger plaintiff's interest in prosecuting suit can be addressed under well-established mootness principles; there is no need to import those principles into Section 16(b) to reach the anomalous result that respondent, who concededly has an adequate interest under Article III, loses his right to prosecute a properly instituted case.

C. Neither precedents nor the possibility of other remedies for insider trading justifies summarily ousting respondent from court. Although this Court's cases reflect a careful approach to the imposition of liability under Section 16(b), those cases do not suggest that standing principles under this remedial law should be construed narrowly. Nor are other possible legal remedies, with more complex elements of proof, adequate substitutes for the independent right provided by Section 16(b).

Finally, the few lower court cases that have articulated a "continuous ownership" requirement have done so in distinguishable contexts; no case involved a shareholder who properly instituted suit only to have his stock later exchanged in a business combination for stock in the issuer's new parent. Because respondent properly instituted this action as a shareholder of the issuer, and his financial interest continued following the post-suit merger, this action may be maintained under Section 16(b).

ARGUMENT

RESPONDENT'S PROPERLY INSTITUTED SECTION 16(b) ACTION WAS NOT SUBJECT TO DISMISSAL BECAUSE OF THE ISSUER'S POST-SUIT MERGER

A. The Plain Language Of Section 16(b) Does Not Support The Dismissal Of A Pending Action Because Of A Post-Suit Merger

The issue in this case is whether Section 16(b) imposes a "continuous ownership" requirement on a shareholder suing for the recovery of short-swing profits. Petitioners contend that the answer is "yes," such that a properly instituted Section 16(b) action must be dismissed where a post-suit merger divests the shareholder of his stock. In our view, the language of the statute renders that contention untenable. Although petitioners repeatedly urge (Pet. Br. 14, 19, 21, 25, 26, 41) that the "plain," "clear," "unambiguous," and "straightforward" language of the statute compels a "continuous ownership" requirement, exactly the opposite is true. The statutory language is satisfied when an action is "instituted * * * by the owner of any security of the issuer," as was this action; the statute says nothing—plainly or otherwise—about dismissing a plaintiff's suit after a merger involving the issuer exchanges the plaintiff's securities for stock in the issuer's new parent.

1. Section 16(b) is the only provision in the original Securities Exchange Act of 1934 that specifically addresses the problem of insider trading. It provides that a director, officer, or principal shareholder must disgorge to the issuing corporation "any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer * * * within any period of less than six months." 15 U.S.C. 78p(b). Section 16(b) was enacted "[f]or the purpose of preventing the unfair use of information which may have been obtained by [a statutory insider] * * * by reason of his relationship to the issuer." *Ibid.* Congress framed Section 16(b) as a "flat rule" to prevent the exploitation of inside information by the designated insiders. *Reliance Elec. Co.* v. *Emerson Elec. Co.*, 404 U.S. 418, 422 (1972); see S. Rep. No. 1455, 73d Cong., 2d Sess. 55-68 (1934); S. Rep. No. 792, 73d Cong., 2d Sess. 9 (1934).

Because of the difficulty of proving that an insider used inside information in his trading, Section 16(b) applies strict-liability principles. It deprives the insider of his short-swing profits, regardless of his intent or actual possession of inside information. See *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582, 592-593 n.23 (1973). The enforcement mechanism of Section 16(b) is equally simple. The Commission is not empowered to sue for disgorgement under Section 16(b); instead, Congress elected to rely exclusively on private actions brought by the issuer, or by a security holder of the issuer, seeking disgorgement of the short-swing profits.

To determine the requirements for security owners to sue under Section 16(b), "the starting point * * * is the language of the statute itself." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985); *Pennsylvania Dep't of Public Welfare* v. *Davenport*, 110 S. Ct. 2126, 2130 (1990). The language authorizing security owner suits under Section 16(b) states:

> Suit * * * may be instituted * * * by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring suit within sixty days after request or shall fail diligently to prosecute the same thereafter.

15 U.S.C. 78p(b). Although petitioners purport to find in this language a "continuous ownership" requirement mandating that a security owner keep his securities throughout the life of a suit, the words simply do not say that. Section 16(b) empowers a security owner to "institute[]" an action; it does not impose any requirements that apply to the security owner's status after instituting suit. It follows that the provision is satisfied whenever, as here, the security owner owns his shares when the suit is initiated. Petitioners simply gloss over the actual language of the statute in insisting that it requires continuous ownership as a condition of standing.[5]

When Congress wanted to address the particular times at which a person must be a security "owner" for purposes of Section 16(b), it was capable of doing so with precision, as it did with respect to a beneficial owner *defendant*. Section 16(b) provides that a beneficial owner is not subject to disgorgement under the statute

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[5] Petitioners effectively acknowledge that point when, in quoting the statute, they state (Pet. Br. 15) that their "continuous ownership" principle is "implicit" in Section 16(b). To justify their claim that the statute implicitly means something it does not say, petitioners observe that Section 16(b) grants standing to a shareholder to institute an action not only if the issuer fails to bring the action in the first place, but also if the issuer "fail[s] to prosecute it diligently." From this, they infer that a security owner must possess his interest throughout the action. But the statute's grant of standing to a security owner to "institute[]" a Section 16(b) action if the issuer fails to pursue it diligently does not suggest (implicitly or otherwise) that a security owner suit, once instituted, is subject to dismissal if a merger converts the security owner's interest into stock in a new parent. Rather, it demonstrates Congress's chief reliance on security owners (not issuers) to prosecute Section 16(b) actions. See p. 14, *infra*.

unless he is a 10% owner "both at the time of the purchase and sale, or the sale and purchase, of the security involved." 15 U.S.C. 78p(b). Likewise, if Congress had wanted to require a security owner *plaintiff* to be a shareholder "both at the time of instituting an action and during the entire period it is maintained," Congress easily could have said so.[6]

2. It is hardly a novelty that Section 16(b) does not require dismissal of an action because of a post-suit merger where the plaintiff had standing to sue at the moment the action was instituted; that approach to statutory standing is deeply rooted in the law. For example, in diversity cases, this Court has consistently held, from the early part of the 19th century to the present, that "if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoRan, Inc.* v. *K N Energy, Inc.*, No. 90-655 (Feb. 19, 1991) (per curiam), slip op. 2 (holding that subsequent addition of non-diverse party did not destroy diversity jurisdiction).[7] The same principle applies to jurisdictional amount-in-controversy requirements. Provided that the plaintiff has properly instituted an action by pleading a sufficient amount in controversy, even if the plaintiff "by stipulation, by affidavit, or by amendment of his pleadings, re-

[6] Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2532 (1990); *International Org. for Masters* v. *Brown*, No. 89-1330 (Feb. 20, 1991), slip op. 9 n.10.

[7] The Court cited for this proposition *Mollan* v. *Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) ("[T]he jurisdiction of the Court depends upon the state of things at the time of the action brought, and * * * after vesting, it cannot be ousted by subsequent events."); *Clarke* v. *Mathewson*, 37 U.S. (12 Pet.) 164, 171 (1838); and *Wichita R.R.* v. *Public Util. Comm'n*, 260 U.S. 48, 54 (1922) ("Jurisdiction once acquired * * * is not divested by a subsequent change in the citizenship in the parties.").

duces the claim below the requisite amount, this does not deprive the district court of jurisdiction." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 292 (1938).

In keeping with that tradition, Congress made it sufficient for standing under Section 16(b) that an action be "instituted" by the owner of any security. See Yourd, *Trading in Securities by Directors, Officers and Stockholders: Section 16 of the Securities Exchange Act*, 38 Mich. L. Rev. 133, 156 & n.74 (1939) ("Section 16(b) permits suit 'by the owner of any security of the issuer' without regard to the time of acquisition of such security. * * * Presumably, ownership of the security at the time that suit is instituted is all that is required under section 16(b).").[8] The term "institute," then as now, refers to the commencement of a proceeding. A contemporary legal dictionary readily available to the 73d Congress defined "institute" to mean: "To inaugurate or commence; as to institute an action." *Black's Law Dictionary* 985-986 (3d ed. 1933) (citing cases).[9] Numerous federal statutes reflect the same usage.[10]

[8] Yourd's observation was made in the context of rejecting the application of the "contemporaneous ownership" rule to Section 16(b), see p. 19, *infra*, but the same reasoning applies to the "continuous ownership" rule advocated by petitioners.

[9] The same definition appears in the current *Black's Law Dictionary* 800 (6th ed. 1990), as well as in general dictionaries, see, *e.g.*, *Random House Unabridged Dictionary of the English Language* (2d ed. 1987) ("institute v., * * * 3. to set in operation; *to institute a lawsuit.*").

[10] See, *e.g.*, 2 U.S.C. 288k(a) ("any action or proceeding pending or to be instituted"); 8 U.S.C. 1503(a) ("action may be instituted only within five years after final administrative denial of such right"). Indeed, Congress has employed the word "instituted" when emphasizing that an action once filed is not subject to dismissal by particular post-suit events. See 42 U.S.C. 405(g) ("Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.").

In light of that background, the "plain meaning" of Section 16(b) is not that a plaintiff must meet some requirement of "continuous ownership" not expressed in the statute. Rather, it is sufficient to establish standing for purposes of the provision's text if a security owner has properly instituted the action.[11]

B. The Purposes And Background Of Section 16(b) Indicate That Respondent's Action Survives The Issuer's Merger

Not only does a "continuous ownership" requirement rewrite the language of Section 16(b), it also conflicts with "the design of the statute as a whole and * * * its object and policy."[12] Imposing such a requirement would undermine Congress's paramount objective in enacting Section 16(b) by removing the class of plaintiffs Congress expected to serve as the primary enforcers. It would be particularly inappropriate to borrow the "continuous ownership" requirement from the law of shareholder derivative actions, because Congress carefully departed from that model to make it easier for security owners to sue. And, a "continuous ownership" requirement is not compelled by standing principles developed under Article III.

[11] Because respondent instituted this action while a security owner of the issuer, this case does not present the question whether a security holder has standing to sue if his shares were divested by a merger before he had time to file a complaint under Section 16(b). For example, an insider's sale that gives rise to Section 16(b) liability may occur simultaneously with a merger that divests all public shareholders of their stock; in that setting, no shareholder would be able to institute an action before ceasing to be an owner (particularly given the 60-day demand period). The issue there is whether Section 16(b)'s authorization of security owner suits encompasses suit by a former shareholder in order to prevent frustration of the statutory purpose. Cf. *Blau* v. *Oppenheim*, 250 F. Supp. 881, 886 (S.D.N.Y. 1966) (shareholders of a parent corporation whose subsidiary acquired the assets of a defunct issuer had standing to sue under Section 16(b) because "[t]o deny them the right to maintain suit would serve to defeat the purpose of the law"). This case also does not present the question whether the SEC by rulemaking could define "owner" to include, among other persons, such a former security owner. See note 30, *infra*.

[12] "In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon* v. *United States*, 110 S. Ct. 997, 1001 (1990); *Grogan* v. *Garner*, 111 S. Ct. 654, 659 n.13 (1991).

1. *The background of Section 16(b) supports a broad construction of security holder standing.* Section 16(b) emerged from detailed examination of the securities markets in the wake of the 1929 stock market crash. The problem of corporate executives and major stockholders abusing their access to inside information was singled out as a particular source of concern for the integrity of the securities markets.

> Among the most vicious practices unearthed at the hearings before the subcommittee was the flagrant betrayal of their fiduciary duties by directors and officers of corporations who used their positions of trust and the confidential information which came to them in such positions, to aid them in their market activities. Closely allied to this type of abuse was the unscrupulous employment of inside information by large stockholders who, while not directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others.

S. Rep. No. 1455, 73d Cong., 2d Sess. 55 (1934). To remedy those abuses, and to restore investor confidence that corporate managers would fulfill their "responsibilities as trustees for their corporations," H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934), Congress enacted Section 16(b).

Not only the general policy of the provision, but its specific features reveal a purposeful effort to grant standing to security holders in an expansive fashion. *First*, although short-swing profits recovered under Section 16(b) flow into issuers' treasuries, Congress did not

rely on issuers alone, or even primarily, to enforce the provision. Rather, recognizing that issuers were unlikely to take action against their executives and major shareholders, Congress decided to harness the energies of security owners.[13] The statute's primary reliance on security holders is manifested in the fact that if the issuer, after demand, refuses to bring the action, or commences it but fails to pursue it vigorously, a security holder has the right to step in and institute suit.[14] And Section 16(b) presupposes that there will be a substantial pool of public security holders available to do so; its requirements apply only to companies with securities registered under Section 12 of the Act, 15 U.S.C. 78*l*, which, in general, includes securities traded on an exchange or in the over-the-counter market.

Second, Congress did not limit the possible plaintiffs under Section 16(b) to stockholders; rather, the class of plaintiffs is broadly defined to include owners of "any security" of the issuer; this includes, for example, holders of warrants, bonds, or other debt securities.[15] 15 U.S.C. 78c(a)(10); see *Reves* v. *Ernst & Young*, 110 S. Ct. 945, 948-949 (1990). The inclusion of debt holders underscores Congress's purpose to rely chiefly on a broad class of public security holders as the vehicle for enforcement for Section 16(b); it would not have been necessary to include a corporation's creditors if a direct benefit to investors were the motive of the provision.

[13] Issuers may also lack the incentive to pursue claims under Section 16(b) because the recovery is not compensatory in nature; the issuer has not experienced any out-of-pocket loss to spur its interest in pursuing a monetary remedy.

[14] *Pellegrino* v. *Nesbit*, 203 F.2d 463, 467 (9th Cir. 1953); *Cramer* v. *General Tel. & Elec. Corp.*, 582 F.2d 259, 276 n.22 (3d Cir. 1978) (dicta), cert. denied, 439 U.S. 1129 (1979).

[15] See Cook & Feldman, *Insider Trading Under the Securities Exchange Act*, 66 Harv. L. Rev. 385, 411 (1953) ("[D]ebenture holders, bondholders, and presumably even a bank holding a promissory note may undertake the litigation.").

Congress's expansive definition of the plaintiff class to include all security owners underscores its design to cast as wide a net as possible to ensure effective and vigorous private enforcement.[16]

Third, the Commission is not authorized to sue under Section 16(b). Consequently, if statutory insiders are protected from security-holder claims by the issuer's post-suit merger, the statute will frequently go unenforced. A rule that eliminates public shareholders as possible plaintiffs under Section 16(b) undercuts the policy of the provision to remove short-swing profits in cases "in which the possibility of abuse was believed to be intolerably great." *Reliance Elec. Co.* v. *Emerson Elec. Co.*, 404 U.S. 418, 422 (1972).

Because it would eliminate the favored class of persons on which Congress intended to rely for the enforcement of Section 16(b), petitioners' narrow rule of standing cannot be reconciled with the policy of the statute. It is no answer to observe that a post-merger issuer may, as here, still have one shareholder with technical standing to sue—its new corporate parent. Congress evidenced a healthy skepticism about the willingness of corporate executives to enforce Section 16(b), as demonstrated by its refusal to give corporations veto power over whether a shareholder can proceed under Section 16(b). That viewpoint has been borne out by experience. As the court of appeals observed, relying on issuers to sue statutory insiders "can be expected to secure the same results as

[16] In accordance with that policy, courts have held that security holders need not have a substantial interest to maintain an action; one or two shares will do. See, *e.g.*, *Portnoy* v. *Revlon, Inc.*, 650 F.2d 895, 897 (7th Cir. 1981); *Pellegrino* v. *Nesbit*, 203 F.2d 463, 466 (9th Cir. 1953) (intervenor). The courts have also held that a particular plaintiff's reasons for suing are irrelevant. See *Magida* v. *Continental Can Co.*, 231 F.2d 843, 847-848 (2d Cir.), cert. denied, 351 U.S. 972 (1956).

* * * when a fox guards a chicken coop." Pet. App. 14a.[17]

The danger is particularly acute in mergers and acquisitions. Those transactions, by their nature, tend to cause short-range price fluctuations that insiders can exploit through their easy access to advance knowledge. Commentators have agreed that without suits by public holders of securities, Section 16(b) will frequently go unenforced in that situation. See ABA, Committee on Federal Regulation of Securities, *Report of the Task Force on Regulation of Insider Trading, Part II: Reform of Section 16*, 42 Bus. Law. 1087, 1134 (1987) (restrictive standing rules "effectively insulate[] conduct plainly prohibited by section 16(b) * * * , since after a friendly merger the 'parent' of the phantom subsidiary is unlikely to prosecute a section 16(b) action against the acquired company's former officers and directors"); P. Romeo, *Comprehensive Section 16 Outline* 70 (E.P. Executive Press, Inc. June 1989) (restrictions on shareholder suits following a merger "shield defendants of the acquired entity from short-swing liability in the vast majority of mergers, since the only party with standing to sue after the merger ordinarily is the surviving corporation, which usually has no interest in seeking recovery under Section 16(b)"). Moreover, if petitioners' approach became the law, it would invite corporations to engage in "intentional restructuring to defeat the enforcement mechanism incorporated in the statute." Pet. App. 17a.[18]

[17] See, *e.g.*, *Lewis* v. *McAdam*, 762 F.2d 800, 802 (9th Cir. 1985) (parent corporation, Sears, rejected a demand to sue the insiders under Section 16(b) because "it would be unseemly and contrary to Sears' best interests to seek recovery" of amount paid to insiders by Sears' subsidiary in a tender offer); *Untermeyer* v. *Valhi, Inc.*, 665 F. Supp. 297, 298 (S.D.N.Y. 1987) (parent attempted to conceal, after a merger, a statutory insider's short-swing transaction, and agreed to indemnify him against Section 16(b) liability), aff'd mem., 841 F.2d 1117, aff'd on reh'g, 841 F.2d 25 (2d Cir.), cert. denied, 488 U.S. 868 (1988). That a handful of Section 16(b) cases have reached this Court in which post-merger issuers were the plaintiffs does not support petitioners' optimistic hypothesis (Br. 32) that enforcement will be adequate without public security holders. In any event, Congress did not share that view.

Against the evidence that a "continuous ownership" rule would frustrate the remedial policies furthered by the statute, petitioners muster a scrap of legislative history, taken out of context, in which they find tangential support. Petitioners note (Br. 16) that during the legislative hearings Thomas G. Corcoran, a spokesman for the drafters, remarked that Section 16(b) would be enforced by "stockholders" who have an "interest" and "a private-profit motive" to recover for their "own account." *National Securities Exchanges—H.R. 7852: Hearings Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 136-138 (1934).

Those comments, however, do not address the standing requirements applicable to plaintiffs, let alone endorse petitioners' concept of "continuous ownership"; rather, they responded to concerns that it would be difficult to enforce a proposed prohibition (later dropped from the bill) against corporate insiders passing confidential tips to others. Even petitioners do not appear to take Corcoran's remarks as a literal description of Section 16(b) standing requirements, because Corcoran referred only to "stockholder" plaintiffs, while Section 16(b) allows suits by bondholders, warrant holders, and other security holders. See p. 14, *supra*. And if Corcoran's remarks were read to contemplate that plaintiffs must have a personal profit motive, that requirement is fully satisfied in this case. Respondent instituted his action while a stockholder of the issuer (International), and, through a business restructuring, became a shareholder of its corporate parent (Viacom). Because Viacom is the sole shareholder of International, and International is the parent company's only asset, Pet. App. 5a, respondent now

[18] Petitioners suggest (Br. 32) that other remedies are adequate to deal with the prospect of restructuring to evade Section 16(b) liability, but that assurance is not comforting in light of the substantial hurdles that those other remedies entail. See p. 24, *infra*.

stands to profit from the success of this action in much the same way as if he had never been divested of his original shares.

2. *The derivative action analogy does not apply to Section 16(b).* Examination of the source of the continuous ownership requirement further undermines its application to Section 16(b). The requirement stems from shareholder derivative actions governed by Federal Rule of Civil Procedure 23.1. As one court has noted, the requirement, "although not expressly stated in the rule, has been inferred from its language." *Lewis* v. *Chiles*, 719 F.2d 1044, 1047 & n.1 (9th Cir. 1983) (continuous ownership requirement flows from Rule 23.1's provision that the plaintiff must "fairly and adequately represent the interests of the shareholders * * * similarly situated").[19] It reflects the equitable nature of the derivative action, in which the shareholder "step[s] into the corporation's shoes * * * to seek in its right the restitution he could not demand in his own." *Ibid.*, quoting *Cohen* v. *Beneficial Indus. Loan Corp*, 337 U.S. 541, 548 (1949). It also acknowledges that the shareholder's interest is in enhancing the value of his stock by obtaining a recovery payable to the corporation. *Lewis* v. *Knutson*, 699 F.2d 230, 238 (5th Cir. 1983); *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727, 735-736 (3d Cir. 1970), cert. denied, 401 U.S. 974 (1971); *Papilsky* v. *Berndt*, 466 F.2d 251, 255 (2d Cir.), cert. denied, 409 U.S. 1077 (1972).

But neither Rule 23.1 nor the principles governing derivative actions are applicable here. Section 16(b) creates a "primary right" in security holders and is not controlled by the requirements of Rule 23.1.[20] For example, the key counterpart of the "continuous ownership" requirement in a derivative action is the "contemporaneous ownership" requirement—that the shareholder must have owned his shares at the time of the transaction challenged by the lawsuit. See Fed. R. Civ. P. 23.1; *Hawes* v. *Oakland*, 104 U.S. 450, 461 (1882); *Bangor Punta Operations, Inc.* v. *Bangor & A. R.R.*, 417 U.S. 703, 708 n.3 (1974). That restriction, however, has no application to Section 16(b); the owner of a security may institute suit "without qualification."[21] Moreover, while a plaintiff must qualify as a "shareholder" (an owner of equity stock) to bring a derivative action under Rule 23.1, any "security owner" (debt or equity) may institute an action under Section 16(b). And, in a shareholder derivative action, directors may refuse a demand for suit, and, in many cases, if their decision "represents an honest business judgment * * * , then a derivative action may not be maintained." 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1831, at 98 (2d ed. 1986). But under Section 16(b), security owners may institute actions notwithstanding the directors' refusal of demand or objection to suit. See *Burks* v. *Lasker*, 441 U.S. 471, 484 n.13 (1979).

These distinctions are revealing. Not only does Section 16(b) depart from the derivative model, it does so consistently in the direction of liberalizing a security owner's ability to sue. Petitioners, however, would in-

[19] See *Lewis*, 719 F.2d at 1047 n.1 (citing cases illustrating that this language "served as an anchor for the concept that ownership must extend throughout the life of the litigation"). No comparable language, of course, appears in Section 16(b).

[20] *Dottenheim* v. *Murchison*, 227 F.2d 737, 738 (5th Cir. 1955) (Section 16(b) does not create a "secondary or derivative" right and is not subject to procedural requirements of a derivative action), cert. denied, 351 U.S. 919 (1956); *Benisch* v. *Cameron*, 81 F. Supp. 882, 884 (S.D.N.Y. 1948) (Section 16(b) "was primarily intended as an instrument of a statutory policy of which the general public is the ultimate beneficiary. Congress did not intend procedural restrictions [applicable to derivative lawsuits] to hamper such policy."); Pet. App. 11a ("The standing requirements for shareholder derivative suits are not applicable to a § 16(b) plaintiff.").

[21] See *Blau* v. *Mission Corp.*, 212 F.2d 77, 79 (2d Cir.), cert. denied, 347 U.S. 1016 (1954); *Dottenheim* v. *Murchison*, 227 F.2d at 740 & n.4; *Benisch* v. *Cameron*, 81 F. Supp. at 883-885. See also 13 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§ 5981.2, at 232 & n.2 (rev. perm. ed. 1984).

voke derivative principles to achieve the opposite effect—to constrain a security owner's suit under Section 16(b). Br. 18. Indeed, petitioners' approach would be even more limiting of security owner suits than the traditional law governing shareholder derivative actions.

While the general rule is that a derivative action must be dismissed when the plaintiff's stock is taken by a merger, courts have recognized exceptions to the continuous ownership rule in that setting,[22] particularly where, as happened here, the plaintiff's interest is exchanged for stock in the new corporate parent.[23] Because the federal securities laws were intended to improve on the protections available under other sources of law, see *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 389 (1983), it would be especially inappropriate to imply a standing limitation under Section 16(b) that is more restrictive than the practice in conventional derivative actions.

3. *Article III considerations do not mandate a continuous ownership requirement.* That Section 16(b) does not require dismissal of a properly instituted suit because of a subsequent merger of the issuer does not mean that

[22] For example, Delaware law allows the plaintiff's action to continue "(1) where the merger itself is the subject of a claim of fraud; and (2) where the merger is in reality a reorganization which does not affect plaintiff's ownership of the business enterprise." *Lewis* v. *Anderson*, 477 A.2d 1040, 1046 n.10 (Del. 1984). See generally D. DeMott, *Shareholder Derivative Actions: Law and Practice* § 4:03, at 38-43 (1987 & Supp. 1990); Note, *Survival of Rights of Action After Corporate Merger*, 78 Mich. L. Rev. 250 (1979) (concluding that shareholders of corporation merged out of existence should be entitled to prosecute derivative actions when necessary to achieve equitable result).

[23] See *Gaillard* v. *Natomas Co.*, 173 Cal. App. 3d 410, 418, 219 Cal. Rptr. 74, 79 (1985) (allowing shareholder to continue her derivative action because her action was pending at the time of the merger, her financial interest in the suit endured, and dismissal would give "free reign to corporate pilfering" by virtue of a merger that management had arranged); *Alford* v. *Shaw*, 327 N.C. 526, 398 S.E.2d 445, 448-451 (1990) (refusing to dismiss derivative action where shareholder's stock was exchanged in a merger).

post-suit events are irrelevant. But petitioners are wide of the mark in contending (Br. 18-19) that a continuous-ownership requirement is "compelled" by this Court's standing jurisprudence under Article III.

An action under Section 16(b), like any action, can be mooted within the meaning of Article III by subsequent events. See *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 404 (1980). But the prospect of mootness somewhere on the horizon does not require that every statute be interpreted to oust from court every plaintiff whose claim *might* become moot. See *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66-67 (1987) (holding that a citizen suit under the Clean Water Act can go forward based on a continuing violation alleged to exist at the time of suit, subject to dismissal under Article III if the case becomes moot). Indeed, the facts of this case demonstrate that "continuous ownership" is not an indispensable condition to ensuring that a live case or controversy persists after a merger. Respondent's stock in International was exchanged not only for cash, but also for an equity interest in International's new parent. That interest indisputably gives respondent a live stake in the outcome—his pecuniary interest.[24] The same will be true in any stock-for-stock merger. Simply because *some* post-merger plaintiffs might lose their standing does not justify reading the statute to oust *all* post-merger plaintiffs from suit—particularly where the effect is to insulate short-swing profits from the recapture remedy envisioned by the statute.

[24] As one court explained in similar circumstances, "[t]he fact that a merger occurred here does not preclude Gaillard [plaintiff] from having a pecuniary interest in the outcome. Gaillard will, in fact, benefit from a favorable judgment. As a shareholder of Diamond [the new parent] she has a proprietary interest in the corporation which is the sole shareholder of Natomas [the original corporation in which she owned stock]. Thus, any benefit to Natomas by a damages award will increase the value of Natomas' stock." *Gaillard* v. *Natomas Co.*, 173 Cal. App. 3d at 418, 219 Cal. Rptr. at 79 (discussing derivative claim).

C. Neither Precedents Nor The Existence Of Other Remedies Requires The Dismissal Of Respondent's Action

In attacking respondent's standing, petitioners rely heavily on this Court's cases considering liability (not standing) issues under Section 16(b), the prospect of remedies under other provisions (whose elements are more difficult to prove than the elements of Section 16(b)), and decisions of lower courts embracing a continuous ownership requirement (in distinguishable situations). None of those considerations justifies the dismissal of respondent's action.

1. Petitioners contend that this Court's prior decisions support a narrow interpretation of Section 16(b)'s provisions. Br. 24 & n.10. But those prior cases consider the scope of liability under Section 16(b), not the standing of security owners to prosecute suit.[25] Because the statute "imposes strict liability upon substantially all transactions occurring within the statutory time period, regardless of the intent of the insider or the existence of actual speculation," *Reliance Elec.*, 404 U.S. at 422, the Court has sought "to apply the statute only when its application would serve its goals," *Kern County*, 411 U.S. at 595, that is, when "the particular type of transaction involved is one that gives rise to speculative abuse." *Reliance Elec.*, 404 U.S. at 424 n.4.

Here, however, as the case comes to this Court, it must be assumed that petitioners' transactions expose them to liability under Section 16(b); the only issue is whether

[25] See *Blau* v. *Lehman*, 368 U.S. 403 (1962) (a partnership that traded in the issuer's stock was not liable under Section 16(b) simply because one partner was a director of the issuer); *Reliance Elec.*, 404 U.S. at 418 (sales occurring after the defendant had reduced his ownership to 9.96% did not give rise to liability under Section 16(b)); *Kern County*, 411 U.S. at 596-604 (a binding option to sell post-merger securities, posing no risk of speculative abuse, was not a "sale" under Section 16(b)); *Foremost-McKesson, Inc.* v. *Provident Securities Co.*, 423 U.S. 232 (1976) (the defendant must be a 10% beneficial owner before his purchase of securities exposes him to liability under Section 16(b)).

the statute must be interpreted in a post-merger setting to destroy the opportunity of a public security holder to enforce petitioners' liability. Whatever reasons may support a strict analysis of the recapture rule of Section 16(b) in the liability setting, there is no reason to construe the statute restrictively in delimiting a plaintiff's standing to seek the statutory remedy where the effect would be to shield insiders not just from disgorgement, but even from having a court examine their liability on the merits.

2. Petitioners also argue that the availability of other remedies makes it unnecessary to grant standing to shareholders like respondent. Br. 32-34. But those alternative remedies cannot substitute for Section 16(b); they all involve significant procedural or other hurdles that Section 16(b) was enacted to surmount.

As petitioners note (Br. 33-34), other remedies under the federal securities law address the problem of insider trading. But the scope of Section 16(b) "is not affected by whether alternative sanctions might inhibit the abuse of insider information." *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232, 255 (1976).[26] Moreover, the principal antifraud provisions, Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, require a showing of scienter, see *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), and those provisions—like other antifraud remedies—require a showing of actual possession of nonpublic information. See, *e.g.*, 15 U.S.C. 78t-1(a); 17 C.F.R. 240.14e-3. Section 16(b), in contrast, requires no showing of intent or actual possession. As many courts have noted, Section 16(b) is expressly designed to avoid complex problems of proof. See, *e.g.*, *Blau* v. *Lamb*, 363

[26] Although the Court in *Foremost-McKesson, Inc.*, 423 U.S. at 255, stated that alternative "sanctions alleviate concern that ordinary investors are unprotected against actual abuses of insider information in transactions not covered by § 16(b)," that reasoning has no application here, where the challenged transactions *are* presumptively covered by Section 16(b).

F.2d 507, 516 (2d Cir. 1966) ("the section's success as a deterrent [is] rooted in its simplicity and relatively automatic operation"), cert. denied, 385 U.S. 1002 (1967); 2 L. Loss, *Securities Regulation* 1043 (2d ed. 1961) (noting simplicity of the elements under Section 16(b)).

The simplicity of Section 16(b) also contrasts with the litigation obstacles awaiting plaintiffs attempting the other remedies offered by petitioners (Br. 32-33): a derivative action for breach of fiduciary duty, or a suit to enjoin or annul a merger on the ground that it was effected for an improper purpose. A derivative claim alleging breach of fiduciary duty is circumscribed by the procedural restrictions of Fed. R. Civ. P. 23.1, and may be vulnerable to dismissal based on the directors' business judgment. And a private action to enjoin a merger not only entails a substantial showing on the equitable factors needed for an injunction, but also places the burden on the plaintiff to establish an improper purpose for the merger. Clearly, those actions would not fill the gap created by petitioners' cramped construction of Section 16(b).

3. Finally, petitioners contend that a line of cases in the lower courts has adopted the continuous-ownership principle, and that any other rule produces unworkable results. Br. 14-15, 34-41. Neither contention is persuasive.

a. The few lower court decisions cited by petitioners involved significantly different facts than are presented here; their discussion of the implications of mergers for shareholder standing must be read in that context. As the Second Circuit pointed out, in two of the cases cited by petitioners, the plaintiffs had never held stock in the issuer, but simply held stock in the issuer's parent. Pet. App. 15a-16a, citing *Untermeyer* v. *Valhi, Inc.*, 665 F. Supp. 297 (S.D.N.Y. 1987), aff'd mem., 841 F.2d 1117, aff'd on reh'g, 841 F.2d 25 (2d Cir.) (per curiam), cert. denied, 488 U.S. 868 (1988), and *Lewis* v. *McAdam*, 762 F.2d 800 (9th Cir. 1985) (per curiam). Courts have been unwilling to allow an action under Section 16(b) to

be instituted by a person who never was a security owner of the issuer.[27] But that principle does not apply here; respondent instituted this action while a shareholder of International, the undisputed issuer of stock in which petitioners made short-swing profits.

The Second Circuit also noted that in two other cases denying standing, the plaintiffs had been cashed-out by a merger, and therefore lacked a continuing financial interest in the suit. Pet. App. 16a, citing *Rothenberg* v. *United Brands Co.*, [1977-78] Fed. Sec. L. Rep. (CCH) ¶ 96,045 (S.D.N.Y.), aff'd mem., 573 F.2d 1295 (2d Cir. 1977); *Portnoy* v. *Kawecki Berylco Indus., Inc.*, 607 F.2d 765 (7th Cir. 1979). In contrast, this case does not involve a cash-out merger; respondent exchanged his stock in part for stock in the new parent, and therefore retains a financial interest in the action similar to what he held at the outset of suit.[28]

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[27] As the courts below noted, Pet. App. 12a-13a, 32a, there is one longstanding exception to that principle, reflected in the decision in *Blau* v. *Oppenheim*, 250 F. Supp. 881 (S.D.N.Y. 1966). There, the director of an issuer allegedly realized short-swing profits before the issuer sold its assets to a subsidiary of another firm, merged into it, and then ceased to exist. A shareholder of the parent then brought suit under Section 16(b), and the court upheld the action, concluding that the term "issuer" in the statute embraced the parent company as well as the successor-in-interest to the defunct issuer. *Id.* at 884-888. That holding responded to the need to provide redress where the policy of the statute would otherwise be defeated. *Id.* at 886. The *Oppenheim* rule and its construction of the term "issuer," however, are not before the Court; unlike in *Oppenheim*, respondent was a shareholder of the issuer when he brought suit. Pet. App. 13a.

[28] The force of *Portnoy* as a precedent is also weakened by an additional factor: the plaintiff in that case expressly disclaimed any reliance on "the possibility [raised by the court] that the language of § 16(b) (that the suit may be 'instituted' by a shareholder of the issuer) could be read to mean that the plaintiff only be a shareholder at the time he filed the action." 607 F.2d at 767 n.4. Petitioners also cite (Br. 37) *Staffin* v. *Greenberg*, 509 F. Supp. 825, 840 (E.D. Pa. 1981), where the district court simply followed

b. Nor does according standing to respondent introduce anomalies into the enforcement of Section 16(b); quite the contrary is the case. If International had merged into another corporation and respondent's stock had been exchanged for stock in the surviving firm, there would be no doubt that respondent, as a shareholder of the surviving firm, would have standing to continue his Section 16(b) action. Cf. *Newmark* v. *RKO Gen., Inc.*, 425 F.2d 348, 352 n.4 (2d Cir.) (shareholders of the surviving firm in a merger are "proper parties to bring an action" under Section 16(b) based on trading in the stock of the merger partner), cert. denied, 400 U.S. 854 (1970); *Morales* v. *Lukens, Inc.*, 593 F. Supp. 1209, 1211 n.1 (S.D.N.Y. 1984).[29] But under petitioners' view, the same shareholder loses his standing if the acquiring company, instead of merging the issuer into itself, forms a wholly owned shell subsidiary and merges it into the issuer. Despite the different corporate formalities, the substance of those two types of business combinations is identical. To allow standing in one case, but to deny it in the other, is to exalt the formal use of a corporate subsidiary over the real nature of the transactions.[30]

* * * * *

Portnoy and *Rothenberg* in the cash-out merger setting without independent analysis; the court of appeals affirmed on other grounds, 672 F.2d 1196, 1207 (3d Cir. 1982).

[29] The standing of shareholders in that situation is consistent with the rule that when an issuer is dissolved upon merging into another corporation, the surviving corporation acquires a right to enforce the former issuer's Section 16(b) claims. See *Western Auto Supply Co.* v. *Gamble-Skogmo, Inc.*, 348 F.2d 736, 739-741 (8th Cir. 1965), cert. denied, 382 U.S. 987 (1966); *American Standard, Inc.* v. *Crane Co.*, 510 F.2d 1043, 1061 n.35, 1062 (2d Cir. 1974), cert. denied, 421 U.S. 1000 (1975).

[30] Petitioners also contend (Br. 27-29) that the SEC's rulemaking efforts to define the term "owner of any security of the issuer" suggest that there are practical obstacles in construing the statute to affirm respondent's standing. But under any of the SEC's formula-

Respondent properly instituted this action as a shareholder of the issuer, and his financial interest in the action continued following the issuer's merger. Rather than ordering this action to be dismissed because of post-suit events that did not impair respondent's concrete interest in proceeding, the court of appeals properly held that petitioners' Section 16(b) liability should be determined on the merits.

tions (as well as the statute itself), respondent could have pursued this action; the issues on which the SEC requested comment concerned whether other plaintiffs should also have standing. See *Ownership Reports and Trading by Officers, Directors and Principal Stockholders*, Exchange Act Release No. 26333 (Dec. 2, 1988), [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,343, at 89,620 (proposing definition of owner that would encompass "a beneficial owner of securities of the issuer at the time of suit," or a "former beneficial owner who was compelled to dispose of the securities because of a business combination"); *Ownership Reports and Trading by Officers, Directors and Principal Stockholders*, Exchange Act Release No. 27148 (Aug. 18, 1989), [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,439, at 80,397 (reproposing narrower definition that continued to encompass plaintiffs like respondent, and requesting comment on whether standing should be extended to, among others, "security holders who have notified the issuer of a short-swing transaction, but are compelled to surrender their securities because a business combination during the 60 days that the statute requires security holders to wait before instituting suit"). In light of the Court's grant of certiorari, the Commission determined not to define the term "owner" under Section 16(b) at this time. *Ownership Reports and Trading by Officers, Directors and Principal Stockholders*, Exchange Act Release No. 28869 (Feb. 8, 1991), at 87-88.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

APPENDIX

Section 16(b), 15 U.S.C. 78p(b), provides:

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

The term "such beneficial owner" refers to a person who owns "more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 12 [15 U.S.C. 78*l*] of this title." Section 16(a), 15 U.S.C. 78p(a).